

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of:)
)
THE TENNIS CHANNEL, INC.)
) MB Docket
) No. 10-204
v.)
)
COMCAST CABLE COMMUNICATIONS,) File No.
LLC) CSR-8285-P
)
Complaint Alleging Program)
Carriage Discrimination)

Volume 1

Wednesday,
April 20, 2011

Hearing Room TW-A363

445 12th Street, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JUDGE RICHARD L. SIPPEL
Chief Administrative Law Judge

Neal R. Gross & Co., Inc.
202-234-4433

APPEARANCES

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Communications, LLC

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1 P-R-O-C-E-E-D-I-N-G-S

2 8:59 a.m.

3 JUDGE SIPPEL: This is the first
4 day of hearing, matter of Tennis Channel
5 versus Comcast, MD Docket No. 10-204.

6 My name Richard Sippel, Chief
7 Administrative Law Judge, presiding Judge in
8 this case.

9 And I'm going to ask counsel to
10 identify themselves, introduce themselves I
11 should say on the record. And I'll ask, maybe
12 it's just easiest to do it by law firm. But
13 let me start with the Bureau first.

14 MR. KNOWLES-KELLETT: Bill
15 Knowles-Kellett for the Enforcement Bureau.

16 MR. OSHINSKY: Gary Oshinsky for
17 the Enforcement Bureau.

18 JUDGE SIPPEL: Thank you. Good
19 morning, gentlemen. Okay.

20 And we'll start with the
21 Plaintiffs.

22 MR. PHILLIPS: Will Phillips from

1 Covington & Burling for the Tennis Channel.

2 MR. SCHMIDT: Paul Schmidt,
3 Covington & Burling for the Tennis Channel.

4 JUDGE SIPPEL: Good morning.

5 MS. TRIVEDI: Neeme Trivedi for
6 Covington & Burling for the Tennis Channel.

7 JUDGE SIPPEL: Okay. And on
8 behalf of Comcast?

9 MR. SOLOMON: David Solomon from
10 Wilkinson, Barker on behalf of Comcast.

11 JUDGE SIPPEL: Mr. Solomon.

12 MR. CARROLL: Your Honor, good
13 morning again. Michael Carroll from Davis
14 Polk & Wardwell for Comcast, and some of my
15 colleagues with me as well.

16 JUDGE SIPPEL: Thank you. Very
17 well.

18 Sir?

19 MR. TOSCANO: Good morning. David
20 Toscano from Davis Polk.

21 MR. MOSS: Good morning, Your
22 Honor. Eddie Moss from Davis Polk.

1 MR. LINDSAY: Wade Lindsay from
2 Wilkinson, Barker.

3 JUDGE SIPPEL: Okay. Fine. Okay.
4 So is that it? We're all set? Okay.

5 This is a heavy lifting session.
6 I set it for 9:00 because I thought that -- I
7 never have any idea how long these are going
8 to go, but I suspect the way it's been
9 organized, it looks like it should move along
10 at a decent pace.

11 I set for 9:00 and I asked, "You
12 know, there's some people coming in from New
13 York," well after the fact.

14 MR. CARROLL: We came in last
15 night, so that's no problem.

16 I think actually, Your Honor, this
17 may be a very short day. We may start out on
18 the most conciliatory note we'll have the
19 entire proceedings. Because I think, my
20 friends will correct me if I'm wrong, that we
21 have proposed stipulations that will for the
22 moment eliminate the need for any arguing over

1 particular exhibits at this stage I think in
2 this case.

3 JUDGE SIPPEL: I think I've
4 mentioned, I've seen that stipulation.

5 MR. CARROLL: Yes.

6 JUDGE SIPPEL: The stipulation.

7 MR. CARROLL: We have that
8 stipulation. In addition, my friends on the
9 other side have some relevance objections to
10 some of our exhibits. But I think, Paul,
11 correct me if this is wrong, that we made an
12 offer yesterday that said look, rather than
13 trying to argue about the relevance before
14 you've heard any of the evidence at all and
15 before we're on my direct case, which will
16 come after theirs, I made the offer and said
17 why don't we just hold off on the need to
18 argue through any of the objections to our
19 exhibits because I may pear down that list
20 after their case. I may not need as much
21 evidence to offer in my direct case. And that
22 would mean we wouldn't be actually be offering

1 for admission the exhibits in my direct case,
2 we don't need them admitted today since my
3 direct case starts after their case.

4 And that I would, I think, obviate
5 the need to go through some of the issues.
6 There weren't a ton of issues, but it would
7 make things simpler at this stage. And in the
8 spirit of trying to move forward
9 cooperatively, I made that offer. And I think
10 that offer has been acceptable to the other
11 side.

12 MR. SCHMIDT: It has, Your Honor,
13 and there are a few categories we were able to
14 talk about as to probably we had a small
15 number of issues between the two sides, so
16 probably 90 percent of those issues we were
17 able to work up some kind of procedure that it
18 may make sense to quickly put on the record as
19 our understanding of where we are.

20 There were two open issues coming
21 out of last night, both of which I think are
22 very discrete that remain for today or if Your

1 Honor wants to consider them down the road
2 that we like to raise. But as Mr. Carroll
3 said, we were able to agree on the majority of
4 open issues to try to expedite things today.

5 JUDGE SIPPEL: That's good news.
6 Okay. But that will definitely help.

7 As I say, you're basically in
8 control of how things get done today because
9 just as Mr. Carroll said, I'm really at sea a
10 lot of, obviously, the documents. And I'd
11 rely on counsel based on past experience, you
12 know I never regret it, I mean I'm going to
13 rely on counsel to get the table set, so to
14 speak, before we move in.

15 Now does that mean if it's going
16 to be a shortened day, either side would you
17 like to consider using the time for opening
18 statements? I'm trying again to think in
19 terms of -- I'm not trying to expedite things,
20 but I got a timeframe and I'm kind of jammed.
21 Think about that. You don't have to answer it
22 now, but you can think about it.

1 MR. CARROLL: Yes. We didn't
2 discuss that. We can think about that.

3 I think, Your Honor, the time
4 we've allotted in our view, which is Monday
5 through the following half day with the firm
6 stop, as we understand it, on the following
7 Tuesday mid-day.

8 JUDGE SIPPEL: That has to happen.

9 MR. CARROLL: I don't foresee any
10 difficulty from our side in meeting that time
11 table. In fact, we may not need that entire
12 time table. So I'm actually not foreseeing
13 that we're going to be pressed for time here.

14 That said if my friends on the
15 other side felt differently and they wanted to
16 try and accomplish something in the way of
17 openings or something later today, we'd be
18 amenable to that.

19 MR. PHILLIPS: Well, Your Honor, I
20 don't think we have any disagreement with
21 that. I do think that the question of timing
22 is an important one to bring up here. The

1 last time that we were altogether we started
2 running into some time concerns, mainly
3 because the first half during our case took
4 longer into cross-examinations, took longer
5 then we expected, which pressed us on the back
6 end.

7 We have 11 witnesses here, as I
8 understand it. We're presenting four and
9 Comcast and is presenting seven. But I think
10 if we can move at a clip where our case is in
11 and done by no later then sort of the end of
12 Wednesday morning, I think we should be fine.

13 JUDGE SIPPEL: The end of
14 Wednesday morning being Wednesday of next
15 week?

16 MR. PHILLIPS: Right.

17 MR. CARROLL: Well --

18 JUDGE SIPPEL: Mr. Carroll?

19 MR. CARROLL: That may be
20 possible. But if I understand that you're
21 proposing a shorter period of time for your
22 time then for our case, and I had always

1 thought of this as each side gets roughly
2 equal time. I'm not sure we're going to have
3 an issue on that, though, because we're not
4 going to have a desire to drag out our cross-
5 examination of their witnesses during their
6 case.

7 But in my rough way of thinking, I
8 think this is how we did it last time, roughly
9 each side going into it thought, okay, each
10 part of the case, their case and our case, if
11 there's a need to we'll be allotted 50 percent
12 or half the time.

13 I think what Mr. Phillips is
14 suggesting is that while given the difference
15 in witnesses, maybe that should be changed
16 some here. And rather than agree to that up
17 front, because I just don't know yet and I
18 think the Court has a sense yet for which
19 witnesses it will have, shall I say, more
20 patience listening to going and forth than
21 others?

22 JUDGE SIPPEL: A lot of the names

1 look familiar.

2 MR. CARROLL: They do. And some
3 of them, Your Honor, as I'm remembering last
4 time, sometimes the Court has a very good
5 sense of an issue and really doesn't need the
6 lawyer to keep going back and forth on it. And
7 other times there could be issues that come up
8 where the Court would really like to hear more
9 evidence in ways that the lawyers can't
10 anticipate.

11 So, I am agreeable to the idea of
12 trying to work through the witnesses as
13 quickly as we can. And again, on our side
14 we're not going to desire to drag out any
15 witnesses just for the sake of doing that. We
16 all have other things to do.

17 JUDGE SIPPEL: Right. Well, I'm
18 not worried about anything dragging, purposely
19 dragging things out. I'm not concerned about
20 that. But I just have a -- you know, time is
21 time. I have to leave. To be perfectly frank,
22 I'm going to be leaving for Germany Tuesday

1 night at 9:00. So if you have to go to 3:00
2 to get it finished, you know fine. But there
3 comes a point -- and I'm going until the 17th
4 of May. You can't get me back. Well, I
5 shouldn't say that. But I don't have any
6 plans of coming back until the 17th May. I
7 certainly don't have a ticket to come back.

8 MR. PHILLIPS: Okay. Well, Your
9 Honor, I just wanted to point the issue today.
10 Mr. Carroll and I in the past have sort of
11 seen eye-to-eye on this sort of thing. I
12 don't think the 50/50 rule quite works here
13 because, as I said, they have twice as many
14 witnesses as we do. But mindful of the clock,
15 I think we should be fine.

16 JUDGE SIPPEL: Yes. I'm going to
17 assume that until I see otherwise.

18 MR. PHILLIPS: We did have a
19 couple of other issues, Your Honor, just to
20 bring up where we weren't really able to quite
21 reach agreement last night.

22 JUDGE SIPPEL: Okay. Just before

1 you say that, I just want to be sure you
2 understand. I'm not pushing to have openings
3 today. I'm simply saying that, you know, I
4 perked up when I hear it might be shorter than
5 I thought. But either way is fine with me.
6 So, don't read into that too much.

7 Go ahead, sir.

8 MR. PHILLIPS: There were a couple
9 of issues that I wanted to raise today with
10 Your Honor. One of them has to do with date.
11 Comcast has offered up about 650 documents to
12 put into exhibits of the trial. And included
13 in those 650 are about [REDACTED] which
14 actually are from many, many years ago, indeed

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] And, indeed, some of them even precede
18 the launch of the Tennis Channel in 2003.

19 Now, you know, relevance is a
20 spectrum, Your Honor, and we certainly agree
21 that Comcast should be given some leeway as to
22 how far back to go. As the Bureau has rule in

1 the Hearing Order that set this trial up, the
2 decision that's at issue here was made in
3 2009. It's the decision about whether or not
4 the Tennis Channel was unfairly discriminated
5 against on the basis of affiliation in 2009.
6 You know, any cutoff from that date becomes
7 somewhat arbitrary, I understand that, but
8 certainly there is a lessening degree of
9 relevance the further back you go from that
10 date.

11 What we suggested --

12 JUDGE SIPPEL: You might be
13 surprised. I want to hold off on that.

14 MR. PHILLIPS: Okay. What we had
15 suggested is just making a bright line date of

16

17 JUDGE SIPPEL: What's the date on
18 that?

19 MR. PHILLIPS: [REDACTED] Your
20 Honor. We thought anything that preceded the
21 contract signing really didn't have much to do
22 with anything. And given the very large

1 amount of exhibits Comcast has offered, it was
2 just a way to short of cut this down to more
3 relevant issues.

4 JUDGE SIPPEL: Let me ask this:
5 And it was signed in [REDACTED] was there a
6 previous agreement that this one supersedes?

7 MR. PHILLIPS: [REDACTED]
8 [REDACTED]

9 JUDGE SIPPEL: Well then how do we
10 get the 2003 launch date?

11 MR. PHILLIPS: Well, 2003 was when
12 it launched generally, but not on Comcast.

13 JUDGE SIPPEL: Oh. But not on
14 Comcast? Okay. Go ahead.

15 MR. PHILLIPS: So there are
16 documents that go back even before the channel
17 was effectively in existence.

18 And --

19 JUDGE SIPPEL: And you're trying
20 to preclude that? There's no need for that?

21 MR. PHILLIPS: Well, only because
22 of relevance, Your Honor. We just don't think

1 that anything -- we don't even think anything
2 going back to [REDACTED] is relevant, but certainly
3 we really need to have that as a bright line
4 date. Going back beyond that, Your Honor, we
5 think is just going too far afield.

6 JUDGE SIPPEL: Simply on the basis
7 of irrelevant information and nothing to do
8 with anything that you want detected, anything
9 you want --

10 MR. PHILLIPS: No, Your Honor, it
11 doesn't.

12 JUDGE SIPPEL: -- super, super
13 secrets or something?

14 MR. PHILLIPS: No, Your Honor, it
15 doesn't. But as I said, there are about 75
16 documents that fall within this category, so--

17 JUDGE SIPPEL: So how long can 75
18 documents that may have some relevance but not
19 high relevance, why should that be a concern?

20 MR. PHILLIPS: Well only in that,
21 Your Honor, I think it's beyond the rule of
22 the boundaries of what's at issue in the case.

1 I think it goes back to things that really
2 don't matter and they're extraneous things.

3 A lot of the documents that are
4 put in there are put in for issues that don't
5 really matter anymore.

6 JUDGE SIPPEL: All right. Okay.
7 Well, I'm talking in a vacuum on this really,
8 so let me hear from Mr. Carroll on this.

9 MR. CARROLL: Well, Your Honor, we
10 disagree very strongly with the idea that some
11 bright line like that.

12 First of all, Mr. Phillips, well
13 correct me but I believe this is right, he
14 himself takes the view that he gets to go back
15 earlier in time then [REDACTED]. Because, Your
16 Honor, you may remember their Tennis Channel,
17 their case is premised on the idea that it
18 should be treated the same as Versus and Golf,
19 our two channels.

20 Well our two channels were
21 launched back in 1995. And there's no way
22 they tell their story; their people want to

1 include the fact and reference the fact that
2 Versus and Golf. In fact they have charts,
3 their experts are preparing to go into this,
4 relating to their launch period and how they
5 got launched.

6 And the market circumstances
7 relating to Versus and Golf's launch in the
8 mid-'90s are going to be at the center of this
9 proceeding because one of the requirements is
10 that the channels be substantially similar and
11 whether there's been discrimination, which is
12 the ultimate issue, Your Honor, has a lot to
13 do with the history of how channels got to be
14 positioned where they are and when those
15 decisions were made. So all that's coming in.

16 I think what Mr. Phillips is
17 really proposing is with respect to his
18 client, he wants to cutoff the evidence in the
19 [REDACTED]. And that doesn't work either, and
20 that would be asymmetrical; that would be a
21 different rule for him then he wants for us.
22 And I'll give you just a couple of quick

1 examples, and again this is a reason why I
2 think some of these issues will be easier to
3 address as we get into the case because you'll
4 have a better sense for what the issues really
5 are and how they're unfolding with the
6 witnesses.

7 We're here again about a sports
8 tier, and Your Honor I know is one of the
9 world's experts on sports tiers by this point.
10 And --

11 JUDGE SIPPEL: I never got any
12 tickets yet.

13 MR. CARROLL: And, Your Honor,
14 this does feel like Groundhog Day a bit for me
15 because it was two years ago on Easter that we
16 were down here last time on the NFL. My wife
17 has reminded me that that was Easter as well.

18 JUDGE SIPPEL: I am not the Easter
19 Bunny.

20 MR. CARROLL: And I'll be here
21 again for Easter.

22 But this is about a sports tier

1 and the Tennis Channel is being carried on a
2 sports tier and believes it's entitled to
3 broader carriage.

4 And one of the interesting facts
5 is we're not the first cable company to put
6 them on a sports tier. [REDACTED] before our
7 agreement, Tennis Channel itself did a deal
8 with another cable company, Time Warner in
9 which they agreed in the Time Warner deal [REDACTED]
10 years before us to a sports tier transaction.
11 We think that's terribly relevant to whether
12 we're the one we're discriminating if the
13 marketplace is already moving to a sports tier
14 before us. And I think that would be relevant
15 to Your Honor understanding the whole picture
16 of how decisions are being made and whether
17 they're being made discriminatorily or whether
18 they're made in recognition of where the
19 market is and the marketplace is.

20 So there's an example of some
21 proof from the earlier period that we think is
22 terribly important. And there's also some

1 other activities with respect to Tennis
2 Channel. [REDACTED]
3 [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED] [REDACTED]
6 [REDACTED] [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] And that document is very
10 interesting, and I'm predicting Your Honor
11 will find it very interesting because they
12 touch on many of the issues and they're
13 [REDACTED]
14 that we are then coming to deal with years
15 later. And the fact that they're doing so
16 even then before any contractual dealings with
17 us, I think speak volumes about whether, again
18 we are causing the problem through
19 discrimination or whether instead what you
20 have is a marketplace that has certain
21 realities associated with it, that we are not
22 responsible for or creating but responding to

1 and it's not discrimination.

2 So, for those reasons highlighted
3 with a few examples, Your Honor, we don't see
4 any way you can impose some bright line rule
5 at this stage.

6 I will say, of course, that the
7 last thing any lawyer, I am sure this is true
8 of the other side as well, wants to do is
9 exhaust the Court's patience by spending time
10 on issues that are ancient history and
11 seemingly don't relate to the issues in this
12 case. But we have no intention to do that, but
13 we do think that there are some factual issues
14 related to the earlier time period that
15 continue to have relevance for the reasons I
16 gave as an example.

17 MR. PHILLIPS: Your Honor, very
18 briefly. Actually, I'm not proposing an
19 asymmetrical rule. In fact, I agree that
20 decisions made about distribution levels are
21 relevant on both sides. The decision in this
22 case that the Media Bureau has set up in the

1 hearing order was that the decision was made
2 in 2009; that's the date. We're talking about
3 the affiliation decision -- the distribution
4 decision.

5 The distribution decision for
6 Versus and Golf were made in the [REDACTED] So I
7 beg to differ that I'm not trying to set up an
8 asymmetrical time date. But to look at it and
9 say "Well, all time is the same" is really an
10 overly simplistic view.

11 What's at issue here are the
12 decisions that were made. And both sides
13 should be able to put in evidence about the
14 decisions made, and I'm not suggesting that
15 they not be given wide latitude to do so. I'm
16 suggesting that documents that go back: For
17 example, an article in the St. Petersburg
18 Times from 2002 about the Tennis Channel,
19 which is before it even gets launched, really
20 isn't relevant to decisions made about the
21 Tennis Channel in 2009.

22 JUDGE SIPPEL: Well, I can tell

1 you right now, if it's a newspaper article,
2 it's going to get very, very little weight.
3 So whether it's in or out --

4 MR. PHILLIPS: I understand, Your
5 Honor. And perhaps that may be in the end the
6 way to deal with this. I just wanted to flag
7 the issue to Your Honor that we do have an
8 objection of a fairly large category of
9 documents based upon their age and their
10 connection to the decision that's made in the
11 case.

12 JUDGE SIPPEL: You said it's only
13 75 documents.

14 MR. PHILLIPS: Well --

15 JUDGE SIPPEL: 675 exhibits, I
16 mean 75 out of 675, is that the idea?

17 MR. PHILLIPS: It's 76 actually
18 out of 650.

19 JUDGE SIPPEL: All right. All
20 right. Well, I don't know what the percentage
21 of that is, but it doesn't make any difference
22 to me anyway. It's just too early to rule on